Supreme Court, U.S.
FILED
APR 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1442

In the Supreme Court of the United States

OCTOBER TERM, 1989

SAVE OUR STREAMS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission abused its discretion when it denied petitioner's untimely motion to intervene in a proceeding concerning an exemption for a proposed hydroelectric project.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 883 F.2d 1024 (Table). The orders of the Federal Energy Regulatory Commission denying late intervention (Pet. App. 28a-33a) and denying rehearing (Pet. App. 5a-8a) are reported, respectively, at 38 F.E.R.C. ¶ 61,058 and 38 F.E.R.C. ¶ 61,313.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1989. A petition for rehearing was denied on November 1, 1989 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on January 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 15, 1984, Mega Hydro, Inc., filed an application with the Federal Energy Regulatory Commission for an exemption from licensing covering a small hydroelectric project in Madera County, California.[1] After accepting the application, the Commission established June 27, 1985, as the deadline for filing comments, competing applications, and requests for intervention in the exemption proceeding; notice of this action was published in the *Federal Register* on May 28, 1985. 50 Fed. Reg. 21,649, 21,651. The Commission also published notice in the *Madera Tribune*, the principal newspaper of general circulation in Madera County.

Almost a year after the deadline for intervention motions, on June 17, 1986, petitioner filed a motion for leave to intervene in the exemption proceeding. Petitioner maintained that "good cause" existed for late intervention under Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.214(d), because notice in the *Madera Tribune* was not a method likely to advise petitioner of the application for the exemption. Pet. App. 29a.

2. On July 30, 1986, the Commission's Secretary, acting under authority delegated to him by the Commission, issued a notice finding that petitioner had failed to show "good cause" for allowing it to intervene in the administrative proceedings. The Secretary explained that *Federal Register* publication constituted adequate constructive notice of exemption applications and that publication in the county

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[1] In general, under Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(1), a license is required for hydroelectric projects that affect interstate or foreign commerce. However, the Commission is authorized by Section 405(d) of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705(d), to grant exemptions from these requirements for certain small power projects of 5,000 kilowatts or less.

newspaper, while not required by statute, "served to supplement notice and inform the public affected by the proposal." Further, the Secretary observed that the record established that petitioner had actual notice of the application soon after the intervention deadline but nevertheless failed to move to intervene within a reasonable time.[2]

3. In an order issued January 28, 1987 (Pet. App. 28a-33a), the Commission affirmed the Secretary's determination that petitioner had not made a showing of "good cause" sufficient to justify late intervention under Rule 214(d). Moreover, the Commission concluded that petitioner had failed to demonstrate that its interests would not be adequately protected by other parties in the proceeding, such as the California Department of Fish and Game or the United States Fish and Wildlife Service. The Commission also found that intervention at such a late date could cause undue prejudice to Mega Hydro by disrupting the timely processing of its exemption application. Pet. App. 32a-33a.

Thereafter, the Commission denied petitioner's request for rehearing. Pet. App. 5a-8a. The Commission rejected petitioner's contention that the Commission's notice of the deadline for intervention petitions was insufficient to comply with the Commission's obligations under the National Environmental Policy Act of 1969. The Commission also found unwarranted petitioner's asserted concern that a motion for intervention filed before *Federal Register* notice of the deadline would be rejected as premature. *Ibid.*[3]

4. The court of appeals, in an unpublished memorandum order (Pet. App. 1a-2a), affirmed the Commission's

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[2] Notice Denying Late Intervention, Project No. 5756-005 (July 30, 1986). We have lodged copies of this notice with the Clerk of the Court.

[3] On March 16, 1987, the Commission issued an order granting Mega Hydro's exemption application. *Mega Hydro, Inc.*, 38 F.E.R.C. ¶ 62,275.

orders. The court noted that petitioner had conceded that it had actual notice of Mega Hydro's application shortly after the intervention deadline but had waited nearly a year before filing its motion to intervene. The court held that because petitioner had failed to show good cause for its delay, the Commission had not abused its discretion in denying the motion to intervene. *Id.* at 2a.

ARGUMENT

The Federal Power Act provides expressly that only parties to Commission proceedings may seek administrative and judicial review of the Commission's orders. Under Section 313(a), 16 U.S.C. 825*l*(a), "[a]ny person * * * aggrieved by an order issued by the Commission in a proceeding under [the Act] to which such person * * * is a party" may apply for rehearing of a Commission order. Similarly, Section 313(b), 16 U.S.C. 825*l*(b), provides that "[a]ny party to a proceeding under [the Act]" may petition for review in an appropriate court of appeals. As this Court observed in *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958), these provisions "prescribe[ ] the specific, complete and exclusive mode for judicial review of the Commission's orders."

The Commission is empowered to promulgate rules and regulations specifying the procedures through which persons interested in a Commission proceeding may become parties and thereby acquire the right to seek administrative and judicial review. Section 308(a) of the Federal Power Act, 16 U.S.C. 825g(a), provides:

> In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other

person whose participation in the proceeding may be in the public interest.

Pursuant to this authority, the Commission has promulgated its Rule 214, 18 C.F.R. 385.214, specifying the procedures and standards governing intervention in Commission proceedings. Subsection (d) of that rule provides that in considering a motion for late intervention, the Commission may consider a variety of factors, including (i) whether the movant has good cause for a late filing, (ii) whether the movant's interest is adequately represented by other parties, and (iii) whether any prejudice or additional burden would be imposed upon existing parties. 18 C.F.R. 385.214(d).

Because the statute limits administrative and judicial review to parties to Commission proceedings, the only question properly presented by this case is whether the Commission abused its discretion in denying a motion for intervention filed nearly a year out of time. As the court of appeals' unpublished memorandum concluded, the Commission was within its discretion in refusing to admit petitioner as a party. That decision, which rests on the particular facts of this case, presents no question warranting further review.

It is well settled that an administrative agency possesses broad discretion with respect to procedural questions of the type presented by this case. As the Ninth Circuit observed in *Pankratz Lumber Co.* v. *FERC*, 824 F.2d 774, 777 (1987), "[b]ecause Congress has empowered FERC to promulgate regulations governing the issuance of exemptions from licensing of certain small hydroelectric power projects, courts afford it broad discretion in determining its own procedures." See also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-525 (1978); *Pacific Gas & Elec. Co.* v. *FERC*, 746 F.2d

1383, 1386 (9th Cir. 1984). It is appropriate for a court to "defer to FERC's interpretation of its own regulation unless plainly erroneous." *Pankrantz Lumber Co.* v. *FERC*, 824 F.2d at 777. Further, where the Commission's rules empower it to exercise discretion, its actions should not be overturned in the absence of a showing of substantial prejudice and an abuse of that discretion. *Ibid.*

In this case, the Commission concluded that none of the factors that its rules require it to consider in connection with an untimely motion for intervention supported adding petitioner to the proceeding. As the court below noted, petitioner "concede[d] it had actual notice of the application in mid-1985, shortly after the June 27, 1985, intervention deadline, and nearly a year before it filed its motion to intervene." Pet. App. 2a.[4] Petitioner also failed to demonstrate that its interests would not be adequately represented by other parties to the proceeding, and the Commission was justified in its conclusion that allowing intervention at that late date would prejudice the applicant and disrupt the proceedings. See also *Covelo Indian Community* v. *FERC*, 895 F.2d 581, 586-587 (9th Cir. 1990) (affirming

[4] Petitioner asserts that it withheld its motion to intervene because of concern that a filing in advance of the *Federal Register* notice would be rejected as premature. Pet. 10-11. However, it cites no instance in which a motion to intervene was denied on this basis. Contrary to petitioner's suggestion (Pet. 11 n.13), *City of Gallup* v. *FERC*, 702 F.2d 1116, 1123-1124 (D.C. Cir. 1983), does not justify any such concern; that case involved petitions for *judicial* review and turned on considerations particular to that type of filing. The Commission's decision in *Halecrest Co.*, 38 F.E.R.C. ¶ 61,312 (1987), which affirmed that the Commission does accept intervention motions submitted before *Federal Register* notice, did not represent a change in the Commission's procedures in this respect.

the Commission's denial of late intervention on similar grounds).

There is no conflict between the decision in this case and *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952). Indeed, in that case, the Court refused to reverse an administrative order because a party to the proceeding had failed to present its claim by means of a timely administrative objection—even though the Court acknowledged that the order was tainted by "an irregularity which would invalidate a resulting order if the [agency] had overruled an appropriate" and timely objection. *Id.* at 38.[5] Nor can the Commission's action fairly be characterized as "an unwarranted extension[ ] of the [administrative] exhaustion rule." Pet. 18. In the Federal Power Act, Congress provided expressly that only parties to Commission proceedings would enjoy the right to seek administrative and judicial review, and it conferred authority on the Commission to prescribe procedures and standards governing intervention. The Commission's straightforward application of that authority to the particular facts of this case presents no question warranting this Court's attention.[6]

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[5] There is also no conflict between the decision in this case and *Swanson Mining Corp.* v. *FERC*, 790 F.2d 96 (D.C. Cir. 1986). See Pet. 21. In *Swanson Mining*, the applicant was a public agency with responsibility for protecting a State's wildlife and environment, and the Commission therefore found that the agency's participation in the proceeding was necessary to protect the public interest. 790 F.2d at 105.

[6] The petition also seeks review of the merits of petitioner's objection to the Mega Hydro project. Since petitioner was not a party to the administrative proceeding, however, the court of appeals had no occasion to consider that question and it is not properly before this Court. Moreover, the Commission's disposition of Mega Hydro's application for an exemption does not conflict with the Ninth Circuit's opinion in *Tulalip Tribes* v. *FERC*, 732 F.2d 1451 (1984). In that case, the Ninth Circuit held that regulations making exemptions available for projects using dams of up to ten feet in height that impounded no

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

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more than two acre-feet of water were inconsistent with 16 U.S.C. 2708(b); that Section allows exemptions only for projects that do not involve "any dam or impoundment." Since the decision in *Tulalip Tribes*, the Commission has considered applications for exemptions on a case-by-case basis without regard to the regulation that the Ninth Circuit disapproved. The Commission has also made clear that exemptions are not available for projects that include "(1) [r]aised diversion structures that span the entire width of the stream, and (2) diversion structures that partially cross a stream and that significantly block the natural flow." Pet. App. 52a. The history of the Commission's actions in this area is set forth in its Order No. 503, which is reproduced at Pet. App. 34a-77a. As petitioner concedes, there is no conflict among the circuits on the validity of the Commission's present approach. Accordingly, even if it were properly before the Court, that question would not call for this Court's review.

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203:00864